tiable Instruments Law carries the doctrine of implied revocation too far, it would seem on principle that this is the better construction of the two. One of the primary purposes of the Negotiable Instruments Law was to protect the bona fide holder. If the latter construction is adopted this purpose will be carried out, but if the former is adopted the bona fide holder will be made to suffer for the illegal acts of the original parties to the transaction, who thereby escape liability.

THE RIGHTS OF AN EQUITABLE TITLE-HOLDER IN COURTS OF LAW IN VIRGINIA.—A sharp distinction was maintained in olden times between legal and equitable rights, and this was due to the jealousy that the judges of the common law courts felt for this new system. As a result, the courts of law absolutely ignored equitable rights, and a legal title was necessary to obtain recognition in the law courts. In many of the United States the introduction by statute of equitable defenses in courts of law has to a great extent modified the common law conceptions, and in these jurisdictions the sharp line between law and equity is gradually disappearing.

The case of a mortgage or deed of trust is a striking illustration of this modification. The earlier and present English doctrine is that the mortgagor transfers the legal estate to the mortgagee, and there remains in the mortgagor only an equitable estate, commonly called the equity of redemption.[1] As was said by Lord Kenyon in *Goodtitle d. Jones* v. *Jones*:[2]

> "* * * this was a mortgage term created in favor of the mortgagee. But in a Court of Law we cannot take cognizance of trusts; and we should be confounding the boundaries between the different Courts, if we allow the plaintiff below [the mortgagor's remote devisee] to recover in ejectment where there is a legal estate in another person."

The modern departure from this theory, which is the rule in most of the code States, particularly the western States of the United States, practically reverses the situation of the parties. Under this theory the mortgagor still retains the legal title, and passes to the mortgagee only the right, on default to sue in equity for foreclosure, or to compel the sale of the property by the trustee, as the case may be. The basis of this change is upon the theory that the mortgage is in the nature of a mere lien to secure the debt; the debt is the principal fact, the mortgage is wholly incidental and collateral thereto, and is intended only to secure its payment; the mortgage is a lien following the land by means of which the land may be condemned to satisfy the debt.[3] In *Dutton* v. *Warschauer*[4] Judge Field said:

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[1] Doe *v.* Staple, 2 T. R. 684; COOTE, MORTGAGES 339, and cases cited.
[2] 7 T. R. 43.
[3] Dutton *v.* Warschauer, 21 Cal. 609; McMillan *v.* Richards, 9 Cal. 365; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 538; Gardner *v.* Heartt, 3 Denio (N. Y.) 234.
[4] *Supra.*

"In this state a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security operating upon the property as a lien or incumbrance only. Here the equitable doctrine is carried to its logical result. Between this view taken and the common law doctrine—that the mortgage is the conveyance of a conditional estate—there is no consistent middle ground."

But it is believed that Virginia has not departed from the common law principles—that the mortgagee or trustee acquires the legal title and may assert his rights in the courts of law, while the mortgagor retains only the equitable title and must resort to equity to enforce his rights.[5] However, in the recent case of *Gravatt* v. *Lane* (Va.), 92 S. E. 912, the court held that an assignee of the mortgagor may maintain ejectment in his own name, and the defendant will not be permitted to set up the outstanding deed of trust to defeat the action. Judgment was awarded to the plaintiff, though not for the whole of his claim, upon the reasoning that the mortgage only created a lien on the property, and therefore the mortgagor had the title requisite to maintain ejectment. The precise question involved seems never to have been decided before in this State. But it is submitted that the holding in the above case is not in accord with the decisions of analogous questions in Virginia, and shows a tendency for the Virginia Court to break down the boundary between law and equity which has been so strictly maintained heretofore.

In the case of *Faulkner* v. *Brokenbrough*,[6] the Court speaking of the nature of a mortgage said:

"The estate of the mortgagee in the property included in the deed, until forfeiture, continues as at common law, before the interference of Courts of Equity. He is entitled to an estate as tenant in mortgage in fee or for a term for years, as the case may be; or to an absolute estate in personal property, as regards title; subject to any agreement as to the possession, and defeasable at law, by the performance of the condition."

In the case of *Ruffner* v. *Lewis* [7] it was held that a conveyance by a mortgagor to a third person before payment of the mortgage debt operated only to pass an equitable estate although purporting to pass an estate in fee simple. President Tucker in delivering the opinion of the court said:

"Prior [the second grantee] in my opinion, never had the legal title. The deed of bargain and sale was made to him after the legal title had been passed away by the deed of trust to Graham, and though that deed was defeated and avoided by the payment

[5] Faulkner *v.* Brokenbrough, 4 Rand. 245; Harris *v.* Harris, 6 Munf. 367; Norman *v.* Hill, 2 Pat. & H. 676.

[6] *Supra.*

[7] 34 Va. 720.

> in June 1805, before the day of payment arrived, yet between its date and the performance of the condition, the fee was in Graham. * * * Graham therefore had the fee and the bargain and sale could only operate as a contract, and of course gave but the equitable estate."

And this view of the mortgagee's interest has always been so well recognized in Virginia that the courts have felt it unnecessary to cite authority to sustain it. Thus, in the case of *Taylor* v. *King* [8] the Court said:

> "With respect to the deed in this case, it is not at this day to be questioned that the deed of a trustee conveys legal title. The trustee takes a legal, though defeasible, title and that title becomes absolute in his vendee by deed of a court of law."

Generally, the plaintiff must hold the legal title in order to bring ejectment,[9] but in some instances a possessory interest is sufficient.[10] In the case of *Taylor* v. *King* [11] it was held that the purchaser at a trustee's sale, who had previously taken an assignment of the debt secured, might maintain ejectment against a grantee of the mortgagor, holding under a deed of bargain and sale made prior to the trustee's sale but subsequently to the deed of trust. The court reasoned that the trustee had the legal title and therefore his grantee had legal title, and since the legal title was essential to prosecute the action, the action was well brought. This case presents the reverse situation from that in the principal case, and it would seem that if the mortgagee's grantee has the right to eject the mortgagor's grantee by virtue of the legal title that is in him, then it could not be held logically that the equitable title holder has the same right.[12]

In a later case, *Reusens* v. *Lawson,*[13] Judge Buchanan, speaking of the title requisite to maintain ejectment, said:

> "The instruction, I think, correctly states the law that an outstanding title, sufficient to defeat a recovery in an action of ejectment must be a present, subsisting and operative legal title upon which the owner could recover if asserting it by action. But * * * there is no reason why a defendant in an action of ejectment should not be permitted to rely upon an outstanding legal title in the Commonwealth. The plaintiff must rely upon the strength of his own title, and if it appear in the cause that the legal title is in another, whether the other be the defendant, the Commonwealth or some other person, it shows that the plaintiff has not the legal title and is therefore sufficient to defeat his recovery."

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[8] 6 Munf. 358, 8 Am. Dec. 746.

[9] Sulphur Mines *v.* Thompson, 93 Va. 293, 25 S. E. 232; Green *v.* Jordan, 83 Ala. 220, 3 South. 513; Grant *v.* Hathaway, 215 Mo. 141, 114 S. W. 609, 15 Ann. Cas. 567. See BURKS, PLEADING AND PRACTICE, § 117; 9 R. C. L. 838.

[10] Lee *v.* Tapscott, 2 Wash. 276. [11] *Supra.*

[12] ADAMS, Tillinghast's ed., EJECTMENT, 32.

[13] 91 Va. 228, 21 S. E. 347.

And in the more recent case of *Leftwich* v. *City of Richmond,*[14] a plaintiff in ejectment was denied recovery, where the deed by which he claimed title was defective in form, so that legal title did not pass by virtue of it. The court said that, "There can be no recovery in an action of ejectment except under special circumstances * * * unless the evidence shows that the plaintiff was the owner of the legal title to the land in controversy at the time the action was commenced."

To the general doctrine in Virginia that to maintain an action of ejectment, legal title must be in the plaintiff, there is a single exception. This is where the mortgage debt has been satisfied and the mortgagor wishes to recover possession of the land from the mortgagee. Thus, in the case of *Hopkins* v. *Ward*[15] it was held that the owner might recover in ejectment land conveyed under a deed of trust, after the purposes of the deed of trust were satisfied. And this exception is now confirmed by statute.[16] In *Lynchburg Cotton Mills Co.* v. *Rives,*[17] land belonging to the wife was conveyed under a deed of trust to secure a debt, the husband joining in the deed. When the debt was discharged the trustee conveyed the land to the husband alone. The wife brought ejectment against her husband to recover the land and the court allowed recovery, basing the decision on the statute. The principal case cites *Hopkins* v. *Ward*[18] and *Lynchburg Coton Mills Co.* v. *Rives*[19] in support of the statement that the holder of the equitable title may maintain ejectment. These two cases are not in point with the principal case, since in both of them the mortgage debt had been satisfied.

We have considered the rights of the mortgagor and mortgagee among themselves, and now a brief consideration will be given to the rights of creditors against the mortgagor.

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[14] 100 Va. 164, 40 S. E. 651.

[15] 6 Munf. 38. Professor Minor in considering the question says: "The * * * proposition—that equitable estates will *not support an action of ejectment* for the land—is, strictly speaking, without exception; but lapse of time, and other circumstances, sometimes justify a *presumption* of the reunion of the legal title with the equitable ownership, in which case the action may be maintained, not on the equitable title, but on the *presumed legal one.* This presumption of reconveyance of the legal title to the beneficial owner is said to be due, not so much to the *lapse of time,* as to the reasonable assumption, that what *ought to be done has been done.* Hence, when the *object of the trust is satisfied,* the conveyance of the legal estate may well be taken for granted, even after only a few years, unless from the nature and object of the original creation of the legal estate in the trustees, there is no inconsistency between the equitable ownership and the fact of the legal estate being allowed to remain outstanding." 1 MINOR, REAL PROPERTY, § 486.

[16] Virginia Code, § 2742. "The payment of the whole sum * * * which any deed of trust may have been made to secure * * * shall prevent the grantee or his heirs from recovering at law by virtue of such deed of trust, property thereby conveyed, wherever the defendant would in Equity be entitled to a decree revesting the legal title in him without condition."

[17] 112 Va. 137, 70 S. E. 542.

[18] *Supra.*

[19] *Supra.*

For the same reasons that have been considered in the preceding part of this discussion, it has always been the rule in Virginia that equitable interests cannot be subjected to the payment of debts by legal proceedings, but that the proper remedy is by a bill in equity.[20] And § 2428 of the Virginia Code, which provides that "Estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof," seems only to make equitable estates liable for debts as if they were legal estates, but does not seem to give the right to subject such equitable estates by legal proceedings.

However, in the case of *Spence* v. *Repass* [21] it was held that the equity of redemption could be levied on by a legal execution. The opinion did not cite authority for its decision and did not discuss the question. Professor Lile's able criticism of this case and the doctrine there announced appeared in 4 *Virginia Law Register* 255.

RIGHT OF MUNICIPAL CORPORATION TO ACQUIRE PROPERTY OF STATE UNIVERSITY BY ADVERSE POSSESSION.—It is universally held that no one can, by adverse possession or prescription, acquire or defeat rights against the United States or the States. The maxim that, *"Nullum tempus occurrit regi,"* applies, and, unless the sovereign in express words makes itself subject to statutes of limitations, this defence can never be pleaded against it.[1] These principles are well settled in regard to sovereign states, but when it is sought to apply them to the subdivisions of government, the greatest conflict is found.

This discussion will be confined to the question of whether or not public corporations, not municipalities, are subject to statutes of limitations. The right of abutting owners to acquire title to railway rights-of-way by adverse possession has been considered in a former volume,[2] as have also the rights of individuals to plead the statutes of limitations against the United States on claims not governmental in character,[3] and the rights of individuals to acquire title to municipal property by adverse possession.[4]

In the recent case of *Trustees of University of South Carolina* v. *City of Columbia* (S. C.), 93 S. E. 934, several interesting questions were raised. The University of South Carolina was chartered by the Legislature, and has always been controlled and

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[20] Claytor *v.* Anthony, 6 Rand. 285; Coutts *v.* Walker, 2 Leigh 268; First National Bank *v.* Anderson, 75 Va. 250.

[21] 94 Va. 716.

[1] State *v.* City of Seattle, 57 Wash. 602, 107 Pac. 827; Cox *v.* Board of Trustees, 161 Ala. 639, 49 S. E. 814. See DILLON, MUNICIPAL CORP., 5th ed., § 1188.

[2] 2 VA. LAW REV. 599.

[3] 3 VA. LAW REV. 155.

[4] 4 VA. LAW REV. 492.